IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MARCUS DELEON MOSBY,
Appellant.

No. 2 CA-CR 2015-0355
Filed December 13, 2016

Appeal from the Superior Court in Pima County
No. CR20143743001
The Honorable Danelle B. Liwski, Judge

AFFIRMED

COUNSEL

The Hopkins Law Office, P.C., Tucson
By Cedric Martin Hopkins
Counsel for Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Staring concurred.

E S P I N O S A, Judge:

¶1 After a jury trial at which he represented himself, Marcus Mosby was convicted of kidnapping and two counts of aggravated assault, all domestic violence offenses. He was sentenced to concurrent and consecutive prison terms totaling 25.75 years. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), asserting he has reviewed the record but found no arguably meritorious issue to raise on appeal. Consistent with *Clark*, 196 Ariz. 530, ¶ 32, 2 P.3d at 97, he has provided "a detailed factual and procedural history of the case with citations to the record" and asks this court to search the record for error.

¶2 Mosby has filed a supplemental brief arguing the trial court erred by denying his requests to impeach the victim based on her criminal history, to present evidence about her "character and lifestyle," and to conduct a courtroom demonstration. He also argues the state committed misconduct by presenting what he describes as "perjured testimony." Finding no error, we affirm.

¶3 Viewing the evidence in the light most favorable to sustaining the jury's verdicts, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), sufficient evidence supports them here. In August 2014, Mosby dragged his live-in girlfriend from their living room into their bedroom, choked her unconscious with the power cord for an iron, slapped her awake, took her to the bathroom, choked her again and held her underwater in the full bathtub, then held her head in the toilet. *See* A.R.S. §§ 13-1204(B), 13-1304(A), 13-3601(A). The record supports the trial court's finding

that Mosby had at least three historical prior felony convictions. His sentences are within the statutory range and were properly imposed. *See* A.R.S. §§ 13-703(C), (J), 13-1204(D), 13-1304(B).

¶4 In his supplemental brief, Mosby first argues the trial court erred in rejecting his request "to use the victim's criminal history in order to impeach" her testimony. We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Chappell*, 225 Ariz. 229, ¶ 28, 236 P.3d 1176, 1185 (2010). The history to which Mosby refers, which the court found irrelevant, appears to be arrests and citations for a variety of offenses, much of it occurring while the victim was a juvenile. Mosby claimed at trial the evidence would show the victim "might be a violent person" with "a history of being in situations of violence." Mosby has not explained how the victim's alleged violent history was relevant to his defense. Nor did he argue below that it was relevant to her credibility. And he has not explained on appeal why the evidence would have been admissible in any event. *See generally* Ariz. R. Evid. 403, 404, 608, 609. Thus, he has not demonstrated the court erred in excluding it. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument on appeal waives claim).

¶5 Mosby further asserts he "had the right to present to the jury any evidence pertaining to the character and lifestyle of the victim." But he refers only to statements redacted from his interview with a police officer, which the court determined were unrelated to the victim's character for truthfulness. Mosby has not identified any error in the court's conclusion or any other basis upon which the statements could have been admitted. *See id.*

¶6 Mosby additionally claims the trial court should have permitted a demonstration with an iron provided by his advisory counsel. He contends the demonstration would have rebutted the victim's claim that he had struck her in the head with an iron despite her lack of head injuries. Courtroom demonstrations are permitted only if they illustrate or explain testimony and if the probative value outweighs the danger of unfair prejudice. *State v. King*, 226 Ariz. 253, ¶ 7, 245 P.2d 938, 941 (App. 2011). Mosby asserts the demonstration "would have been very probative as the jury would

have been able to see that being hit in the head with an iron would indeed have caused substantial damage." It is not clear how any physical demonstration would illustrate that the victim was being untruthful about being struck with an iron. And, in any event, contrary to his suggestion on appeal, Mosby did not suggest at trial that a demonstration with the iron would have been useful to show the victim was lying about her injuries.[1] Thus, we do not address this argument further.

¶7 Mosby also asserts the state committed misconduct by "knowingly us[ing] perjured testimony" because the victim had made numerous statements before trial that were inconsistent with her testimony. The state's knowing presentation of perjured testimony would require reversal. *State v. Ferrari*, 112 Ariz. 324, 334, 541 P.2d 921, 931 (1975). But "[c]ontradictions and changes in a witness's testimony alone do not constitute perjury and do not create an inference, let alone prove, that the prosecution knowingly presented perjured testimony." *Tapia v. Tansy*, 926 F.2d 1554, 1563 (10th Cir. 1991). In other words, the mere fact that a witness made inconsistent statements and is called to testify for the state does not establish the prosecutor knowingly elicited false testimony. *United States v. Griley*, 814 F.2d 967, 971 (4th Cir. 1987); *see also Ferrari*, 112 Ariz. at 334, 541 P.2d at 931 (prosecutor may call witness to testify even if witness made prior inconsistent statements, without committing misconduct). Mosby has not established any misconduct occurred.[2]

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[1]At trial, Mosby requested to use the iron for the victim to illustrate how the cord had been wrapped around her neck. He does not explain how this demonstration would have benefitted his defense.

[2]Mosby also suggests the state improperly vouched for the victim's credibility in closing argument. However, he did not request that this court be provided with a transcript of closing arguments. *See* Ariz. R. Crim. P. 31.8(b)(2)(ii), (b)(4). "It is within the defendant's control as to what the record on appeal will contain, and it is the defendant's duty to prepare the record in such a manner as to enable an appellate court to pass upon the questions sought to

¶8 Pursuant to our obligation under *Anders*, we have searched the record for fundamental error and found none. *See State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985). And we have rejected the arguments Mosby raised in his supplemental brief. His convictions and sentences are therefore affirmed.

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be raised in the appeal." *State v. Rivera*, 168 Ariz. 102, 103, 811 P.2d 354, 355 (App. 1990). We therefore do not address this issue.